IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO. 4338 OF 1993

Major R.P. Lamba
age about 54 years,
Occ: Service
38 A, Victoria Road,
Pune - 411 001 .. Petitioner

Vs.

1. Union of India
by its Secretary
Ministry of Defence,
New Delhi.

2. Director General
N.C.C.
Ramkrishna Puram
New Delhi - 110 066. .. Respondents

Mr. A.V. Anturkar i/by Smt. Vinita Bakre Shastry with Mr.S.B. Deshmukh for Petitioner. The State of Maharashtra

Mrs. S.V. Bharucha with Mr. D.A. Dubey for Respondents.

**CORAM : B. H. MARLAPALLE &**
**D. B. BHOSALE,JJ.**

**Date : April 26, 2006.**

**ORAL JUDGMENT (PER B.H. MARLAPALLE,J.):**

1. This petition filed under Article 226 of the Constitution prays for a writ of mandamus in terms of the following directions:-

(a) To continue the petitioner in service till

he attains the age of 57 years i.e. till 31st October, 1995.

(b) To direct the respondents to consider his long delayed promotion to the rank of Major and Lt. Col., and

(c) To allot proper placement in the seniority list vis-a-vis Part Time Officers granted Whole Time Officers commission.

2. While granting Rule, interim relief in terms of prayer clause (A) was ordered by this court vide order dated 27/10/1993 and consequently the petitioner, who was to retire on 31st October, 1993 on attaining the age of 55 years continued in service and retired on 31st October, 1995 on reaching the age of 57 years. The relief in terms of prayer clause (A) as listed above was thus already granted to the petitioner and, therefore, we are required to consider the petition in respect of the remaining two reliefs. We also note at this juncture that the order granting interim relief passed on 27/10/1993 was not challenged by the respondents at any time and thus it received its finality.

3. Return has been filed by the Deputy Director General, N.C.C., Maharashtra and it has been pointed that the petitioner was promoted to the rank of the substantive post of Major by the Competent Authority with effect from 29/12/1981 for the purpose of seniority, pay and allowances. Therefore, the grievance regarding promotion and seniority in the post of Major also stands settled, except to the extent that the learned counsel for the petitioner pointed out that from 29/12/1979 the arrears were not paid. We will look into this grievance while dealing with the averments made by the respective parties.

4. The petitioner was commissioned in the Army on 26/1/1964 as an Emergency Commissioned Officer and was released according to the policy of the Government of India, sometimes in the year 1967 after he had actively participated in the Indo-Pak war of 1965. He was granted N.C.C. whole time commission in 1968 as per the terms and conditions of service set out in the Government of India order dated 21/12/1963. He was promoted, initially, to the post of Major with effect from 7/4/1981 and his seniority was decided sometimes in May 1981. As per the petitioner the respondent nos.1 and 2 wrongly applied the standard of equity of Part Time Officers with those of Whole Time Officers

and he refers in this regard to the order dated 13/5/1981. It is not disputed that the terms and conditions of service applicable to the serving N.C.C. Whole Time Officers were circulated vide the letter of the Government of India dated 23//5/1980. Clause 2 of the said conditions deals with promotions and reads as under:-

> "The Officers shall be eligible for promotion to higher ranks as under if they are found fit and vacancies exists:-
>
> (a) Substantive Capt.- On completion of 8 years service subject to availability of vacancies.
>
> (b) Substantive Major- By selection on completion of 15 years service, subject to availability of vacancies. "

. So far as pension, family pension, death-cum-retirement gratuity and other terminal benefits are concerned, clause 8 of the said conditions states that the Officers will be governed by the Central Civil Service (Pension) Rules, 1972 as amended from time to time. By a further letter dated 13/5/1981 sanction of the President of India was

conveyed for adopting the procedure for fixing the seniority of N.C.C. Officers for the purpose of regulating their promotions/grant of substantive ranks in the cadre and as per sub-clause (c) thereunder in case where the officers came to be appointed to the N.C.C. cadre after a break in service, the period of break shall be excluded while reckoning the post of past service of these officers for seniority and promotion. As per the petitioner even if the break in service is excluded he would complete 15 years on 1979 and the respondents have rightly granted him promotion in the substantive post of Major from 29/12/1979.

5. As at present, we are required to decide, (a) whether the petitioner's pensionary benefits are required to be paid to him on the basis that he retired from service from 31st October, 1995 and (b) whether he is required to be paid his salary, as if in service, till 31st October, 1995. As per the respondents the petitioner was not entitled for superannuation at the age of 57 years and, in fact, he ought to have retired on 31st October 1993 on reaching the age of 55 years, but for the interim relief granted by this court. It is further contended that inspite of the said interim order of this court, the petitioner will have to be treated to have retired on

31st October, 1993 and not on 31st October, 1995 and his payment of salary as well as fixation of pension will have to be on the basis that he retired on 31st October, 1993. As per the respondents the reliance of the petitioner on the decision of the Apex Court in the case of Union of India and Anr. vs. Lt. Col. Komal Charan and ors. reported in AIR 1992 SC 1479. The respondents had also taken up the plea that the petitioner, moreover, required to approach the Central Administrative Tribunal by filing an application under Section 19 of the Administrative Tribunal's Act, 1985. This issue of alternative remedy cannot be considered by us now when the petition was admitted, interim relief was granted and it remained on our file for almost 13 years and in any case while granting Rule, the issue of jurisdiction or alternative remedy was not left open.

6. In the case of Lt.Col. Komal Charan (Supra) the issue, whether the officers appointed on whole time basis in the N.C.C. are governed by the fundamental rules applicable to the Civil Servants serving under the Union of India and accordingly entitled to continue in service until the age of 58 years had fallen for consideration. The Supreme Court held that the fundamental rules were not attracted to

the service conditions of the officers appointed on whole time basis in the N.C.C. The Supreme Court, however, referred to the letter dated 23/5/1980 sent under the signature of the Under Secretary to the Government of India to the Director General, N.C.C., New Delhi and observed as under:-

> ".....It was considered desirable that before a person was granted N.C.C. permanent commission in terms of the above letter an opportunity should be given to him to consider the terms and conditions of the appointment and then indicate his choice by exercising his option in the form prescribed in Appendxi-B to the letter. The relevant order in clear terms lays down the age of superannuation at fifty-five years with a further provision of extension to the age of fifty-seven years. The respondents exercised their option and were accordingly granted whole time N.C.C. commission. They cannot now repudiate the same and claim any additional benefit which they are not entitled to under any rule or law."

7. In the instant case the petitioner is not

claiming that his age of superannuation ought to be 58 years in terms of Fundamental Rules [Rule 56 (a)] and his claim is limited, namely, that he was entitled for extension of two years and thus due to retire on 31st October, 1995. He claims that the communication dated 24/5/1980 which was forwarded to him for seeking his option in the prescribed form in Appendix-B, he had not received Appendix-B and, therefore, he could not exercise the option and he came to know of this aspect of exercising option only after reading the judgment of the Supreme Court in the case of Lt. Col. Komal Charan. The respondents on the other hand have referred to the letter dated 23/5/1980 and reiterated that the petitioner was required to retire at the age of 55 years and the officers who were granted permanent commission as per letter dated 24/5/1980 were governed by the conditions set out in the letter dated 23/5/1980 and were required to give option as to whether they wanted to be governed by the said terms and conditions and it was only after these officers gave option to be governed by this letter, that they were granted permanent commission. The affidavit in turn seeks to say that the mere fact that the petitioner was granted permanent commission would imply that he had exercised an option in the prescribed form in Appendix-B. We, therefore, called

upon the learned counsel for the respondents to submit the record before us and more particularly the option exercised by the petitioner in May 1980 or thereafter. Though the officers representing the respondents are present before us from time to time, we are informed that the record relating to the petitioner's option is not traceable and on some occasions we had granted adjournments specifically to again put in efforts to locate the record. We are informed finally that the record could not be located.

8. The fact remains and as has been noted by the Apex Court in the case of Lt.Col. Komal Charan (Supra) that there was a provision for extension of two years to be considered for being retained in service till the age of 57 years and in case while exercising option the officer concerned had indicated his choice to retire at the age of 55 years, such an option was not available to him. Petitioner's case consistently has been that Appendix-B was not forwarded to him and he could not sign the same and was unaware of the provision for exercising option for being continued till the age of 55 years, which aspect for the first time he claims to have learnt from the decision of the Apex Court.

9. As noted in the earlier part of this Judgment, by the interlocutory order of this court the petitioner was allowed to continue till the age of 57 years and thus impliedly he was granted the extension of two years by the judicial order of this court and that order remained unchallenged. At the same time, the petitioner was on duty and he discharged the duties assigned to him till 31st October, 1995 though he was required to approach us by filing Contempt Petition No.328 of 1994. We, therefore, do not see any reason to deny the remaining reliefs, namely, payment of his salary upto 31st October, 1995 and determination of his pension and other retirement benefits on the basis that he retired on 31st October, 1995. This relief has been opposed by the respondents solely on the ground that the petitioner had exercised his option by signing Appendix-B and at the same time they are not able to place before us the concerned record which ought to be in their custody. The petitioner having worked till 31st October, 1995, cannot be denied the salary for the period he actually worked on account of the interlocutory order passed by this court. Undoubtedly, his pensionary benefits also will have to be worked out on the basis that he retired on 31st October, 1995 on reaching the age of 57 years.

10. We, therefore, allow this petition and direct the respondents to take steps, (a) for the payment of petitioner's salary till 31st October, 1995, including arrears therein, (b) to refix his pensionary benefits on the basis that he retired on attaining the age of superannuation on 31st October, 1995 and (c) to consider his case for further promotion to the post of Lieutenant Colonel on the basis that he was promoted to the post of Major on 29/12/1979, if he is found to be eligible for the same promotion, undoubtedly he will be entitled for arrears in salary and this issue of promotion as well as the consequential benefits to the post of Lieutenant Colonel shall be decided by the respondents as expeditiously as possible and in any case within a period of six months from today. Needless to mention, if the petitioner has been in receipt of provident fund amount or any other cash benefit by way of retirement on the basis that he is retired on 31st October, 1993, the same shall be adjusted while settling the financial dues in terms of this order.

11. Rule is made absolute in terms of the above directions, but without any order as to costs.

12. We also make it clear that the view taken by us in this petition is based on the peculiar facts of this case and we may not be presumed to have laid down general propositions of law extending the age of retirement to 57 years to all the N.C.C. officers.

**(D.B. Bhosale,J.)** **(B.H. Marlapalle, J.)**